Supreme Court, U.S.
FILED

No. 98 386

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROMAN PERALES,
Petitioner,
v.
SUPREME COURT OF TEXAS, Chief Justice Thomas R. Phillips; Justices Raul A. Gonzalez; Nathan I Hecht; John Cornyn; Craig Enoch; Rose Spector; Priscilla R. Owen; James A Baker; Greg Abbott; in their individual and official capacities; DAN MORALES, Attorney General of Texas, individually and in his official capacity; Board of Law Examiners, Rachael Martin, Executive Director of Texas Board of Law Examiners; Warlick Carr, Chairman, Texas Board of Law Examiners; individually and in their official capacities,
Respondents.

On Writ of Certiorari and/or Mandamus To The United States Court of Appeals for The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

Whether mandamus should issue to compel the lower courts' Judges and Magistrate Judge to exercise their authority when they had a duty to do so to take as true the said allegations in the anti-trust complaint and to assume jurisdiction to proceed with the merits of the case.

Whether the lower courts' Judges as a matter of U.S. Supreme Court decisional law failed to exercise their authority when they had the duty to do so to take as true the allegations of the complaint that alleged that the rule governing admissions and its enforcement, involving the grading formula for the bar exam made by the Board of Law Examiners but not approved by the Supreme Court of Texas, are in violation of the Sherman Anti-Trust Act by illegally reducing the number of attorneys in the state.

Whether the lower courts' failure as a matter of law to take as true the said allegations illegally denied the Petitioner bar applicant's statutory rights and rights of access to courts, due process and equal protection under the First and Fifth Amendents of the United States Constitution.

Whether the lower courts' failure to take as true the said allegations usurped the rule of law that requires that the allegations must be taken as true; and usurped the statutory law that authorizes person injured by violation of anti-trust laws to bring complaint to protect the public.

LIST OF THE PARTIES

1. Petitioner herein, ROMAN PERALES, is a bar applicant to the State Bar of Texas; Plaintiff in the United States District Court for the Southern District of Texas; Appellant in the United States Court of Appeals for the Fifth Circuit.

2. Respondents are the panel of Circuit Judges of the Fifth Circuit Court of Appeals included Honorable Johnson, Jones and DeMoss, Circuit Judges.

3. Respondent is the District Judge, the Honorable Filemon Vela.

4. Respondent is the Magistrate Judge, Honorable John Black.

5. Respondents/Appellees/Defendants: SUPREME COURT OF TEXAS, Chief Justice Thomas R. Phillips; Justices Raul A. Gonzalez; Nathan I Hecht; John Cornyn; Craig Enoch; Rose Spector; Priscilla R. Owen; James A Baker; Greg Abbott; in their individual and official capacities; DAN MORALES, Attorney General of Texas, individually and in his official capacity; Board of Law Examiners, Rachael Martin, Executive Director of Texas Board of Law Examiners; Warlick Carr, Chairman, Texas Board of Law Examiners; individually and in their official capacities.

Respondents/Appellees'/Defendants' Counsel: Dan Morales, Jorge Vega, Laquita A. Hamilton, Toni Hunter, Allison Eccles, James Pinson, and Ida Gonzalez.
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By:
Roman Perales

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ROMAN PERALES,
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SUPREME COURT OF TEXAS,
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Respondents

On Writ of Certiorari and/or Mandamus To The United States Court of Appeals for The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI AND/OR MANDAMUS

To the Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the Supreme Court:

Roman Perales, the Petitioner, prays that writ of certiorari and/or mandamus issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit that was rendered on March 27, 1998, which rehearing and suggestion en banc was denied on May 26, 1998.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE LOWER COURTS

Order of the Fifth Circuit Court of Appeals denying petition for rehearing and suggestion en banc, May 26, 1998, is reported and is reproduced in Appendix H. Order and Opinion of the Fifth Circuit Court of Appeals on appeal affirming the judgment of the district court, March 27, 1998 is not reported but is reproduced in Appendix G. Order of the Fifth Circuit Court of Appeals denying the Motion for Injunction, November 28, 1997 is not reported [R.]. Order of the Fifth Circuit Court of Appeals denying Motion for Rehearing of Petition for Writ of Mandamus, November 12, 1997 is not reported [R.]. Order of the Fifth Circuit Court of Appeals denying Petition for Writ of Mandamus, October 28, 1997 is not reported [R.]. Order of the District Court for the Southern District of Texas denying motion for rehearing, July 30, 1997 is not reported but is reproduced in Appendix F [R]. Order of the District Court for the Southern District of Texas dismissing the complaint for want of jurisdiction and adopting the report and recommendation of the Magistrate Judge, May 21, 1997 is not reported but is reproduced in Appendix E [R.]. Magistrate Judge's Report and Recommendation, April 28, 1997 is not reported but is reproduced in Appendix D [R.]. Magistrate Judge's Minute entry on request for t.r.o. and/or temporary injunction, recommending denial of t.r.o. and/or temporary injunction, December 11, 1996 is not reported but is reproduced in Appendix B [R.].

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The opinion and final judgment of the Court of Appeals sought to be reviewed was entered on March 27, 1998 and the Court of Appeals denied the motion for rehearing and rehearing en banc on May 26, 1998. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 (1). This petition for writ of certiorari and/or mandamus is filed within

90 days of the entry of judgment by the Court of Appeals denying the motion for rehearing.

Jurisdiction to grant the writ of mandamus to the Justices of the Court of Appeals, Honorable Johnson, Jones and DeMoss, Circuit Judges, and the District Court Judge, Honorable Filimon, and Magistrate Judge, Honorable John Black is conferred on this Court by 28 U.S.C. §1651(a). This Court has certiorari jurisdiction over the complaint, the final judgment of the District Court dismissing the anti-trust complaint and over the judgment of the court of appeals, which affirmed the dismissal. The writ is in aid of the Court's certiorari jurisdiction to review whether the regulation for the admission to the practice of law and its regulation involving the grading formula not approved by the State Supreme Court violates the Sherman Anti-Trust Act. The exceptional circumstances of the lower courts' failure as a matter of law to exercise its authority when it had the duty to do so to take as true the allegations of the complaint as plead, and construe these allegations in the light most favorably, precludes certiorari jurisdiction to review the grading formula and warrant the exercise of the Court's discretionary powers. Adequate relief cannot be obtained in any other form or from any other court.

The basis of federal jurisdiction in the district court is pursuant to 28 U.S.C. §1337.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

U.S. Supreme Court Jurisdiction
Certiorari: 28 U.S.C. §1254 (1)
Mandamus: 28 U.S.C. §1651(a)

U.S. Supreme Court Rules
Certiorari: Rule 10 et seq, Jurisdiction on Writ of Certiorari
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Anti-Trust Jurisdiction of District Court, 28 U.S.C. §1337

Sherman Anti-Trust Act, 15 U.S.C. §1 seq

Rule 12 (b) (1) of Rules of Civil Procedure

First and Fifth Amendments of the United States Constitution

STATEMENT OF THE CASE

On December 5, 1996, Roman Perales, Petitioner and an applicant for the State Bar of Texas filed a complaint under the Sherman Antitrust Act, 15 U.S.C., §1 seq, in the United States District Court for the Southern District of Texas, Brownsville Division. The Petitioner sued the Supreme Court of Texas, its Justices individually and in their official capacity, the Board of Law Examiners of the Supreme Court of Texas, its Executive Director and Chairman, individually and in their official capacity and the Attorney General, individually and in his official capacity and the Office of the Attorney General of Texas.

The complaint alleged that based on the grading formula for the bar examination, the Petitioner did not pass the 1991 bar exam by one-fifth of a point and therefore was denied admission to the bar. The complaint further alleged that the regulation for the admission to the practice of law involving the grading formula for the bar exam and its enforcement violates the Sherman Act by illegally reducing the number of attorneys in the state. The complaint alleged that the grading formula was made by the Board of Law Examiners but was not approved by the Supreme Court of Texas. Petitioner sued for temporary restraining order and/or temporary injunction and permanent injunction to enjoin the enforcement of the grading formula and for immediate admission to the State Bar. [R. Original Complaint and Application for T.R.O. and/or Temporary Injunction].

A hearing was held before the Magistrate Judge on December 11, 1996 on the request for temporary restraining order and/or temporary injunction. The Magistrate Judge did not file a written report and recommendation to the district

court but orally recommended to deny the motion. [R. Appendix B, Minute Entry, December 11, 1996].

On April 8, 1997, the Petitioner amended his complaint. Along with seeking to enjoin the grading formula and immediate admission to the Bar, the Petitioner also sought treble damages. [R.; Appendix A, First Amended Complaint; and Amended Application for temporary restraining order and temporary injunction].

Respondents/Defendants on April 15, 1997 filed a motion to dismiss for want of jurisdiction. They alleged in their motion, that the complaint in "actuality" alleged only prior state court proceedings. [R., Appendix C, Defendants' Motion].

The Magistrate Judge John Black's report and recommendation was filed on April 28, 1997. [Record, Appendix D, Report and Recommendation]. The report and recommendation which was approved by the District Court Judge Filemon Vela on May 21, 1997, stated in pertinent part, that as to the allegations in the Petitioner's pleadings, that the complaint alleged:

> Perales claims that the defendants violated the Sherman Anti-Trust Act 15 U.S.C. §1 seq. The factual predicate of this claim is that under Texas law the function of the Board of Bar Examiners is to advise the Texas Supreme Court which has the authority to set standards for the Bar Examination. According to Perales and not denied by the State Defendants, the Board of Bar Examiners did not get approval from the Supreme Court for the formula used in 1991 to determine whether or not someone had passed the Exam.

The report and recommendation concluded that the District Court has no jurisdiction of the complaint because as the Respondents/Defendants alleged that the complaint alleged and construed, "in reality it is a complaint about the way he

was treated in the Texas Judicial system." The Magistrate Judge recommended and the district court held that the complaint alleged and construed it only, as an attack of a state court judgment and dismissed the complaint accordingly. [R. Appendix E, Order of Dismissal, filed on May 21, 1997].

Objections to the Report and Recommendation were timely filed. [Record]. On a motion for rehearing to the District Court, it denied the motion on July 30, 1997. [R. Appendix F, Order Denying Rehearing].

The Petition for writ of mandamus and/or writ of prohibition was filed in the Court of Appeals on October 10, 1997. The Court denied the petition on October 28, 1997. The Court of Appeals also denied the motion for rehearing on November 14, 1997. Motion for injunction pending appeal was also filed on November 14, 1997. On December 1, 1997, the Court of Appeals denied the motion for injunction.

On appeal, the Court of Appeals on March 27, 1998, panel of Respondent Circuit Judges, Johnson, Jones, and DeMoss, affirmed the District Court. [R., Appendix G, Opinion, filed on March 27, 1998]. The Court of Appeals stated that Petitioner alleged "[i]n his complaint, Perales argued that the grading formula used in the 1991 Texas Bar Examination violated the Sherman Act."

The Court of Appeals held that the complaint alleged and construed it only, as

> [s]tripped to its essentials, Perales's complaint is an attack on the judgment of the state court. Therefore, after careful review of the record and the controlling authorities, this court holds that the district court did not err in dismissing Perales's complaint for lack of subject matter jurisdiction."

On May 26, 1998, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc. [R., Appendix H, Order, filed on May 26, 1998.

SUMMARY OF ARGUMENT

Petitioner contends that the Respondents/Defendants' motion to dismiss, the Magistrate Judge's minute entry, report and recommendation and the lower courts' orders, opinion, judgment and mandates are in disregard as a matter of law of the plain mandate of the U.S. Supreme Court which holds that the allegations of the complaint must be taken as true and that these allegations must be construed in the light most favorably to the plaintiff in passing on a motion to dismiss. The defendants and the lower courts did not take as true and did not construe in the light most favorable, the allegations in the complaint as pleaded that the regulation for the admission to the bar and its enforcement, involving the grading formula for the bar exam which was not approved by the Supreme Court of Texas violated the Sherman Anti-Trust Act.

Such dismissal for want of jurisdiction which the lower courts failed to exercise its authority when it had the duty to take as true the said allegations in the complaint, illegally deprived the petitioner's rights of access to courts, due process and equal protection under the First and Fifth Amendments of the United States Constitution.

The unauthorized orders usurped the power of the rule that the allegations in the complaint must be taken as true; and usurped the Sherman Anti-Trust statute which authorizes a private person a right to sue to protect the rights of the public from monopolies and restraint of interstate commerce.

REASONS FOR GRANTING THE WRITS

Certiorari should be granted because the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this court.

This case involves a manifest injustice in the failure as a matter of law to take the allegations in the complaint as true. The law in the area clearly mandates that the lower courts must take as true the allegations in the complaint that alleged that the rule governing admissions and its enforcement, which involved the grading formula for the bar exam that was not approved by the State Supreme Court violates the Sherman Anti-Trust Act. Petitioner seeks a summary reversal. The Petitioner urges this Court to summarily reverse.

Mandamus should be granted to compel the lower courts' Judges to exercise their authority when they had the duty to do so to take as true the allegations of the complaint and to construe them in the light most favorable to the Petitioner.

ARGUMENT

MANDAMUS SHOULD ISSUE

The Petitioner alleges in the petition for writ of certiorari and/or mandamus that the lower courts' Judges failed to exercise their authority when they had a duty to do so to take as true the said allegations of the complaint and construe them in the light most favorable to the Petitioner. Under the law, a writ of mandamus involves directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. Mandamus is one that is traditionally issued in response to abuses of judicial power. Thus, where a district judge refuses to take some action he is required to take or takes some action he is not empowered to take, mandamus will lie. *Bankers Life & Cas. Co., v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106. The Supreme Court may issue a writ of mandamus in aid of the appellate jurisdiction that might otherwise be defeated by the unauthorized action of the court below. *McClellan v. Carland*, 217 U.S. 268, 30 S.Ct. 501, 503, 54 L.Ed. 762.

This case is extraordinary and the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct.

269, 273, 19 L.Ed. 2d 305; *Banker's Life & Cas. Co. v. Holland*, 346 U.s. 379, 382-385, 74 S.Ct. 145, 147-149, 98L.Ed. 106; *Ex parte Fahey*, 332 U.S. 258, 259, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041. The writ has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S., at 95, 88 S.Ct., at 273, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185.

The district court's failure to consider the merits of a summary judgment motion is a failure to exercise its authority when it has the duty to do so. *In re School Asbestos Litigation*, 977 F.2d 764, as amended. In the case at bar, the lower courts' failure as a matter of law to take as true the said allegations and contrue them in the light most favorable is the failure to exercise its authority when it has the duty to do so.

DUTIES OF LOWER COURTS TO TAKE ALLEGATIONS AS TRUE

The Petitioner's claim under the Sherman Act has been dismissed for want of jurisdiction pursuant to Rule 12(b)(1) and the correct procedure is to treat a dismissal as having been on the jurisdictional ground for the obvious reason that if the court lacks jurisdiction to hear the case, it lacks jurisdiction to rule on the merits. *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F2d 884 (CA3 1977).

The Respondents/Judges are not authorized by law to dismiss the complaint based on their disbelief of the complaint's factual allegations. The allegations of the Respondents/Defendants and the holding of the lower courts that the complaint is only an attack on a prior judgment of the state court constitutes the Respondents Judges' disbelief of the complaint's factual allegations that the grading formula violates the Sherman Act. Under the law in *Neitzke v. Williams*, 490 US 319, 104 L.Ed 2d 338, 109 S.Ct. 1827 (1989), the

> assumption [is] that the factual allegations in the complaint are true" on a motion to dismiss. What Rule 12(b)(6) does not countenance are dismissals based on the judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support.

Facial attacks on the complaint,

> require[ ] the court merely to look and see if [the]plaintiff has sufficiently alleged a basis of subject matter jurisdiction and the allegations in his complaint are taken as true for purposes of the motion.

Garcia v. Copenhaver, Bell & Associates, M.D.'s, 104 F.3d 1256(11th Cir. 1997), citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (quoting *Menchaca v. Chrysler Credit Copr.*, 613 F.2d 507, 511 (5th Cir. 1980), cert. denied, 449 U.s. 953, 101 S.Ct. 358, 66 L.Ed. 2d 217 (1980) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

The district court will accept all material allegations of the complaint as true and construe them in the light most favorable to the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). The U.S. Supreme Court held in *Scheuer v. Rhodes*, that:

> When a federal court reviews the sufficiency of a complaint . . .[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test . . . [I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

In reviewing a complaint dismissed for lack of jurisdiction or for failure to state a *claim, the appellate court must consider its allegations as true. Woodard v. Los Fresnos Independent School Dist.*, 732 F.2d 1243, (C.A. Tex. 1984); *Miller v. Stanmore*, 636 F.2d 986 (C.A. Tex. 1981); *Spector v. L Q Motor Inns, Inc.*, 517 F.2d 278, rehearing denied 521 F.2d 815, certiorari denied 96 S.Ct. 786, 423 U.S. 1055, 46 L.Ed. 2d 644. *Cummings v. U.S.*, 648 F.2d 289. (C.A. Tex. 1981).

FAILURE AS A MATTER OF U.S. SUPREME COURT DECISIONAL LAW TO EXERCISE AUTHORITY WHEN IT HAD THE DUTY TO DO SO

The lower courts and the Respondents/Defendants, failed to take as true the allegations of the complaint as pleaded. The complaint alleged the invalidity of the regulation for the admission to the Bar that involved the grading formula for the bar examination. It alleged that the said regulation was not approved by the Supreme Court and violates the Sherman Anti-Trust Act. The lower courts took as true the allegations of the Respondents/Defendants in their motion to dismiss. The allegations in their motion to dismiss do not take as true the allegations of the complaint and cast a less favorable light on the anti-trust complaint and hence, caused the complaint to fail.

This court should consider whether the Respondents/Defendants and the Respondent lower courts Judges failed to take as true the said allegations and to fairly represent the wording of the anti-trust complaint. They interpreted the Rooker-Feldman Doctrine as authority for the courts to "strip" as true the said allegations and construe the wording of the complaint differently.

Under the law, the courts and the defendants must take as true the said allegations. They are not authorized by law to substitute their own allegations or version of the complaint, in place of the said allegations for which the plaintiff alleged.

Their own allegations, language or version significantly changed the results. This court should rule that by law, that the allegations, wording or version of the complaint as stated by the defendants and held by the lower courts failed to take as true the said allegations in the complaint.

In light of the Supreme Court's and the Circuit Court of Appeals' cases of *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984); *Feldman v. Gardner*, 661 F.2d 1295 cert denied, *Feldman v. District of Columbia Court of Appeals*, 458 U.S. 1106, 102 S.Ct. 3483, 73 L.Ed. 2d 1366 (1982); *Hickey v. District of Columbia Court of Appeals*, 458 U.S. 1106, 102 S.Ct. 3483, 73 L.Ed.2d 1366 (1982); and *Goldfarb v.Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L.Ed. 2d 572 (1975), the lower courts failed as a matter of law to exercise their authority to take the said allegations as true and construe them in the light most favorable to the complainant.

The U.S. Supreme Court has assumed the allegations as true in a complaint that alleged that a rule or regulation for the admission or for the practice of law that was not approved by the legislature or the supreme court of the state is in violation of the Sherman Act and it construed these allegations in the light most favorably.

The Magistrate Judge's report and recommendation stated that *Hoover v. Ronwin*, 466 U.S. 558 (1983) involved a fact situation virtually identical to Perales, in that both alleged that the regulation for the admission to the practice of law involving the grading formula violates the Sherman Anti-trust Act. The report additionally stated that,

> Perales attempts to distinguish Hoover from his case by arguing that the Texas Board of Bar Examiners did not submit the grading formula to the Texas Supreme Court in 1991. He argues that this administrative lapse permits the application of the Sherman Act to his claims.

However, the lower courts held that Petitioner's complaint should be construed as one that only attacks a prior state court judgment.

In *Hoover*, the bar applicant alleged in the complaint that the grading formula was in violation of the Sherman Act. The facts in the *Hoover v. Ronwin* case also stated that the bar applicant had been engaged in litigation in the state court. On a motion to dismiss, the court took as true the allegations of the complaint, that alleged that the grading formula violated the Sherman Act and construed these allegations in the light most favorable. Moreover, the U.S. Supreme Court assumed jurisdiction of these allegations that were taken as true and that were construed in the light most favorably; and the Supreme Court reviewed the merits of the claim.

In *Feldman v. Gardner*, 661 F.2d 1295 cert denied, *Feldman v. District of Columbia Court of Appeals*, 458 U.S. 1106, 102 S.Ct. 3483, 73 L.Ed. 2d 1366 (1982); *Hickey v. District of Columbia Court of Appeals*, 458 U.S. 1106, 102 S.Ct. 3483, 73 L.Ed.2d 1366 (1982), which also resulted in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the Court of Appeals on review of the motion to dismiss the anti-trust claim for want of jurisdiction, took as true the allegations in the complaint that the regulation for admission to the bar violated the Sherman Anti-Trust Act. In footnote 9 and 33, the Court of Appeals acknowledged that it had taken as true all the facts well-pleaded in the complaints, including the said allegations in complaints. The Court of Appeals said that because the case is before it on appeal from the grant of a motion to dismiss, " we take as true all well-pleaded allegations of the complaint." The court assumed jurisdiction of these allegations that alleged the regulation for the admission violated the Sherman Anti-trust Act and ruled on the merits of the claim.

In the *Feldman v. Gardner* case, the district court concluded as the Respondent/Defendants and the Respondent lower courts' Judges herein, that bar applicant sought essentially a review of a judicial order of the state court. The Court of Appeals on footnote 61, held that the district court dismissed bar applicant's anti-trust claim on a different ground--that it had been resolved by the District of Columbia Court of Appeals and thus could be reviewed only by the Supreme Court. The Court of Appeals held that it believed

this rationale to be erroneous, both because there was no adjudication on the merits of that claim by the Court of Appeals and because the District Court has exclusive original jurisdiction over federal anti-trust actions. The Court of appeals affirmed the dismissal on the analysis of the merits of the case and took as true the allegations that the regulation for admission in question violates the Sherman Anti-Trust Act and construed them in the light most favorably; and assumed jurisdiction of these allegations for purposes of a motion to dismiss for failure to state any cognizable cause of action. The U.S. Supreme Court denied certiorari to review the decision and the grounds of the Court of Appeals on the dismissal of the antitrust claim.

The facts in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790, 95 S.Ct. 2004, 2014, 44 L.Ed. 2d 572 (1975), are more analogous to the facts in the case at bar. Goldfarb involved procedures governing the practice of law that were not approved by the State Supreme Court or the State legislature. In that case, the plaintiffs sued the Virginia State Bar and the County Bar Association. The county bar association published the challenged rule and the Virginia State Bar enforced the rule. In that case, the United States Supreme Court granted certiorari to decide whether the challenged regulation for the practice of law not approved by the Supreme Court violated §1 of the Sherman Act as amended, 15 U.S.C. §1.

Chief Justice Burger stated for the U.S. Supreme Court in that case, that

> [h]ere we need not inquire further into the state action question because it cannot fairly be said that the State [ ] through its Supreme Court Rules required the anticompetitive activities of [defendants].

In *Goldfarb v.Virginia State Bar*, the Court for purposes of jurisdiction, assumed the allegations as true that the challenged regulation for the practice of law that was not approved by the state supreme court is in violation of the Sherman Anti-Trust Act. The U.S. Supreme Court assumed

that the district court had jurisdiction of the said allegations of the complaint. The complaint alleged that the challenged regulation not approved by the Supreme Court violated the Sherman Act and the Court proceeded to decide on the merits. On the merits, the U.S. Supreme Court held that any regulation and its enforcement, for the practice of law not approved by the Supreme Court are a violation of the anti-trust laws. Under this case, not only is the petitioner herein entitled to have the said allegations of the complaint taken as true and construed most favorably, but is entitled to have the district court assumed jurisdiction of these allegations and is entitled to a favorable ruling on the merits of the anti-trust claim that alleged that the grading formula that was not approved by the Supreme Court violates the Sherman Act.

The failure as a matter of law to take the allegations as true precluded the United States Supreme Court from ultimate review of this case on certiorari to decide whether the challenged regulation for the admissions to the practice of law not approved by the Supreme Court violated §1 of the Sherman Act as amended, 15 U.S.C. §1.

FAILURE TO TAKE AS TRUE THE ALLEGATIONS VIOLATED STATUTORY AND CONSTITUTIONAL RIGHTS

The failure to take the said allegations as true and construe them as required by law on a motion to dismiss, illegally denied the right to have the allegations in the complaint taken as true, and illegally denied the statutory rights and the right of access to the courts, the right of due process and equal protection under the First and Fifth Amendments of the U.S. Constitution. see *In Re Southwestern Bell Telephone Co.*, 535F.2d 859 99176); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994).

USURPATION OF POWERS

The main purpose of the statute authorizing a person injured by the violation of the anti-trust laws to recover treble damages is to protect the public from monopolies and restraint of trade, and the private right of action for treble damages is incidental and subordinate to that main purpose. The grant of a claim for treble damages to persons injured by violation of anti-trust laws is for the purpose of multiplying the agencies which will help enforce the anti-trust laws and theretofore make them more effective. The very foundation of the right of a private suitor to recover treble damages under the statute authorizing a person injured by violation of anti-trust laws to recover treble damages is the violation of public rights prohibited by anti-trust laws and, indeed, made criminal offenses. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 801. The failure as a matter of law to comply with the law to take as true the allegations of the complaint and construe them most favorably usurped the rule that required the courts to assume as true the allegations of the complaint; and usurped the statute that authorizes a private person to protect the public from monopolies and restraints. Moreover, the failure to take as true the allegations of the complaint illegally denied the right to review and ruling of the complaint that alleged the violation of federal law by the state and its officials in the grading formula for the bar exam and enforcement of that grading formula.

CONCLUSION AND PRAYER

WHEREFORE, the said Roman Perales, seeks the aid of the Honorable Court and respectfully requesting, prays:

1. That the petition be granted;

2. The judgment of the Court of Appeals be reversed and the case remanded for further proceedings;

3. That a writ of certiorari and/or mandamus be issued directing and commanding the Honorables Johnson, Jones and DeMoss, Circuit Judges of the Fifth Circuit Court of Appeals, and the other judges of the Fifth Circuit, and the District Court

Judge, and Magistrate Judge to vacate the Magistrate's Report and Recommendation, and the orders, opinions, judgments and mandate on decision for dismissal for want of jurisdiction;

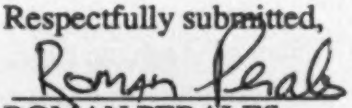
4. That a writ of mandamus be issued directing and commanding the Fifth Circuit Court of Appeals and the District Court and Magistrate Judge to take as true the allegations in the complaint that alleged that the regulation for the admission to the practice of law involving the grading formula for the bar exam which was not approved by the Supreme Court of Texas violates the Sherman Act, and contrue them in the light most favorable to the Petitioner in passing on a motion.

5. Order that the District Court has jurisdiction over elements of the complaint that alleged that the bar admission rule and its enforcement involving the grading formula for the bar exam that was not approved by the State Supreme Court are in violation of the Sherman Anti-Trust Act;

6. Remand for further proceedings on the request for temporary restraining order and/or temporary injunction and for trial on the merits;

7. That this Honorable Court grant to the Petitioner such other and further relief as may be just in the premises and as the Court may deem proper.

Respectfully submitted,



ROMAN PERALES
3505 Boca Chica, Suite 162
P.O. Box 5566
Brownsville, Texas 78523
(956) 541-3848
(956) 541-3572
Pro se

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF Nueces §

BEFORE ME, the undersigned notary public, on this day personally appeared ROMAN PERALES, who being by me duly sworn on his oath, deposed and said:

1. "I am the Petitioner in this proceeding, and Appellant in the underlying court of appeals' action styled Roman Perales v. Supreme Court of Texas, et al, Cause No. 97-40721, of which certiorari and/or mandamus proceeding arises. I have read the above and foregoing Petition for Writ of Certiorari and/or Mandamus and every factual statement contained therein is within my personal knowledge and is true and correct."

2. "This petition has an appendix which is being submitted to the United States Supreme Court. I have personal knowledge that each copy of the pleadings, motions and orders contained in the appendix is a true and reproduced copy of pleadings, motions, and orders in the underlying district court action and Court of Appeals of which mandamus proceeding arises.

3. Further Affiant saith not.

Roman Perales
Roman Perales

SUBSCRIBED AND SWORN TO BEFORE ME on the 24th day of August, 1998, to certify which witness my hand and official seal.

Manuel Rodriguez III
Notary Public in and for
The State of Texas

My commission Expires:

NOTARY PUBLIC STATE OF TEXAS
Manuel Rodriguez III
Notary Public, State of Texas
My Commission Expires 5/15/02

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF Nueces §

BEFORE ME, the undersigned notary public, on this day personally appeared ROMAN PERALES, who being by me duly sworn on his oath, deposed and said:

I am the Petitioner in this case and am capable of making this affidavit. I am an applicant to the Bar of Texas. I was denied and refused admission in 1991 to the present on the sole basis of the 1991 grading formula for the bar examination. The grading formula was made by the Board of Law Examiners but was not approved by the State Supreme Court. I filed a complaint in the Federal District Court that alleged that the grading formula violated the Sherman Anti-Trust Act.

Defendants filed a motion to dismiss that failed to take as true the allegations of the complaint and instead argued that the complaint in reality is an attack of prior state court judgment.

The United States District Court Judge and Magistrate Judge and the Court of Appeals Circuit Judges failed to exercise as a matter of law, their authority when they had a duty to do so to take as true the said allegations of the complaint and construe them in the light most favorable.

The Petitioner Roman Perales has been denied his right to have the said allegations of the complaint taken as true in violation of the statutory rights and in violation of the rights to his day in court, due process and equal protection; and no forum is provided for contesting the challenged grading formula that constitutes a per se violation of the Sherman Anti-Trust Act. No remedy exists to compel the District Court Judge and Magistrate Judge and the Circuit Court Justices to exercise their authority when they had a duty to do so to take as true the said allegations of the complaint; and no remedy exists to compel the lower courts to assume jurisdiction of the

complaint as plead, and to proceed with the request for temporary restraining order and trial on the merits.

3. Further Affiant saith not.

Roman Perales

Roman Perales

SUBSCRIBED AND SWORN TO BEFORE ME on the 27th day of August, 1998, to certify which witness my hand and official seal.

Notary Public in and for
The State of Texas

My commission Expires:

NOTARY PUBLIC STATE OF TEXAS

Manuel Rodriguez III
Notary Public, State of Texas
My Commission Expires 5/15/02

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

ROMAN PERALES,
Plaintiff

vs. § CIVIL ACTION NO. B-96-226

SUPREME COURT OF TEXAS, CHIEF JUSTICE THOMAS R. PHILLIPS; JUSTICES RAUL A. GONZALEZ; NATHAN I. HECHT; JOHN CORNYN; CRAIG ENOCH; ROSE SPECTOR; PRISCILLA R. OWEN; JAMES A. BAKER; GREG ABBOTT; in their individual and official capacities; DAN MORALES, Attorney General of Texas, individually and in his official capacity; BOARD OF LAW EXAMINERS OF TEXAS; RACHAEL MARTIN, Executive Director of Texas Board of Law Examiners; WARLICK CARR, Chairman, Texas Board of Law Examiners; individually and in their official capacities

JURY

Defendants

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, PRELIMINARY AND PERMANENT INJUNCTION AND OTHER RELIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES, ROMAN PERALES, hereafter called Plaintiff, complaining of the SUPREME COURT OF TEXAS,

THOMAS R. PHILLIPS, Chief Justice; Justices, Raul A. Gonzalez, Nathan I. Hecht, John Cornyn, Craig Enoch, Rose Spector, Priscilla R. Owen, James A. Baker, Greg Abbott, individually and in their official capacities; Dan Morales, Attorney General of Texas, individually and in his official capacity, Board of Law Examiners of Texas; Rachael Martin, Executive Director of the Board of Law Examiners of Texas, individually and in her official capacity, Warlick Carr, Chairman of the Board of Law Examiners of Texas, individually and in his official capacity, their agents, servants, and/or employees, and all other persons acting in active concert with them or under their control and direction, hereinafter called Defendants, and for cause of action show the Court as follows:

Parties

1. Named Plaintiff is ROMAN PERALES, a resident of the Southern District of Texas, and an applicant to the Bar of Texas. Named Plaintiff completed all the requirements of the State of Texas for admission to the Bar of Texas in 1991. Plaintiff's right to have his 1991 application for admission be governed by the rules approved by the Supreme Court is continuing to be denied by the continuing enforcement of the complained formula for the grading of the bar examination to the 1991 application for admission.

2. Defendants are:

(a) THE SUPREME COURT OF TEXAS, the highest Court for bar admission matters established by the Constitution of the State of Texas, by serving Thomas R. Phillips, the Chief Justice of said Court;

(b) THOMAS R. PHILLIPS, Chief Justice of the Supreme Court of Texas, individually, and in his official capacity,

(c) RAUL A. GONZALEZ, Justice of the Supreme Court of Texas, individually and in his official capacity;

(d) NATHAN I. HECHT, Justice of the Supreme Court of Texas, individually and in his official capacity;

(e) JOHN CORNYN, Justice of the Supreme Court of Texas, individually and in his official capacity;

(f) CRAIG ENOCH, Justice of the Supreme Court of Texas, individually and in his official capacity;

(g) ROSE SPECTOR, Justice of the Supreme Court of Texas, individually and in her official capacity;

(h) PRISCILLA R. OWEN, Justice of the Supreme Court of Texas, individually and in her official capacity;

(i) JAMES A. BAKER, Justice of the Supreme Court of Texas, individually and in his official capacity;

(j) GREG ABBOTT, Justice of the Supreme Court of Texas, individually and in his official capacity;

(k) DAN MORALES, Attorney General of Texas, individually and in his official capacity;

(l) BOARD OF LAW EXAMINERS OF TEXAS, by serving Rachael Martin, Executive Director of said Board;

(l) RACHEL MARTIN, Executive Director of the Board of Law Examiners of Texas, individually and in her official capacity;

(m) WARLICK CARR, Chairman of the Board of Law Examiners of Texas, individually and in his official capacity;

their agents, servants, and/or employees, and all other persons acting in active concert with them or under their control and direction. Plaintiff has furnish protest and notice of this action, and the grounds therefor, to the Defendants.

Jurisdiction and Venue

4.1 This action is brought pursuant to the Sherman Anti-Trust Act, §1 et seq., 15 U.S.C.. §1 et seq.

4.2 This Court has jurisdiction pursuant to 28 U.S.C. §1337.

5. There is no remedy, and not even a forum, under State law in State Courts, or judicial or administrative process to exhaust, because the State Judicial system, including the highest judicial body, is enforcing the grading or scoring system complained and made by the Board and not approved by the Supreme Court in these proceedings. Further the judiciary of the State of Texas, are the enforcers of the grading or scoring system complained, and are not disinterested parties.

6. This Court also has jurisdiction under 28 U.S.C. §2201, §2202, to declare the relief sought, because no plain, speedy and efficient remedy, or forum, may be had in the courts of this State, and this Court may enjoin and restrain the

enforcement of the said procedure as to grading or scoring system made by the Board and not approved by the Supreme Court. In fact, much of the basic complaint in this action is that no provision is made for either a plain, speedy, or efficient remedy, or for any remedy at all, including a hearing or appeal thereof. There is no state forum to adjudicate per se anti trust violations as to the 1991 grading or scoring system complained.

7. This Court has venue under 15 U.S.C. §22, and as supplemented by 28 U.S.C. §§1391 and 1392, in that the Defendant Supreme Court of Texas has statewide jurisdiction, transacts business statewide, and the cause of action arose within the Southern District of Texas.

7.1 All Defendants have previously appeared on motion for temporary injunction by the Office of the Attorney General of Texas, Mr. James Pinson, and have been previously served, and no service of process is required in that they will receive a copy of First Amended Complaint by and through their attorney of record.

Nature of the Case

8.1 This action concerns the continuing per se violation of the Sherman Act by the Defendants. The Defendant Justices denied the Plaintiff's 1991 application for admission based on the formula made by the Board and not approved by the Supreme Court. The decision of the Supreme Court to deny Plaintiff's 1991 application was based on the procedure made by the Board alone, without approval of the Supreme Court of Texas, as to the grading or scoring system for the bar examination. The action of the Board without approval by the Supreme Court as to the grading or scoring system and the continuing enforcement of it, constitute continuing per se violation of the Sherman Act.

8.2 The Texas Law requires that prior to the examination, the Supreme Court of Texas approve any procedure made by the Board before that procedure becomes effective. Under the law, the Board only advises the Supreme Court of Texas as to the governing of admission to the Bar. In 1994, the Supreme Court of Texas approved the grading or scoring system recommended by the Board as to prospective bar examinations

8.3 While the Supreme Court of Texas in 1994 approved the formula, it continues to, intentionally and with knowledge, to deny Plaintiff's 1991 application for admission based on the procedure made by the Board alone. The Supreme Court's denial of Plaintiff's 1991 application is based on the procedure made by the Board alone, that is not state sovereign action as a matter of law and violates per se Sherman Anti-Trust Act.

8.4 The formula made by the Board and not approved by the Supreme Court was enforced on the 1974 to 1994 applications for admission. Presently, the formula complained continues to be enforced on the 1974 to 1994 applications for admission and the applications for 1974 to 1994 continue to be denied on the basis of the formula made by the Board and not approved by the Supreme Court.

8.5 Plaintiff claims the procedure as to grading or scoring system made by the Board and not approved by the Supreme Court, jointly, Defendants Court and Board and their Chief Officers and others continue to violate per se the Sherman Antitrust laws by unlawfully reducing the number of attorneys to practice law. Specifically, this action complains of the procedure, as to grading or scoring system made by the Board and not approved by the Supreme Court, both as enacted by the Board alone and as enforced by the Supreme Court, and in continuing to deny Plaintiff's right to have his 1991 application for admission be governed by the rules approved by the Supreme Court.

Facts

9. That the formula for the 1991 bar examination and for the 1974 to 1994 bar examinations, was not approved by the Supreme Court is undisputed. In 1991, Plaintiff Roman Perales, a bar applicant, met all the requirements of the State of Texas for admission to the Bar of Texas. There was however one obstacle for admission to the Bar. The Board of Law Examiners made and applied a procedure as to grading or scoring system for the bar examination without approval of the Texas Supreme Court. The Texas Supreme Court denied and continues to deny Plaintiff's right to have his 1991 application for admission be governed by the rules approved by the Supreme Court. Based on the said procedure for the bar

examination, and denial of the right to be governed by rules approved by the Supreme Court, Plaintiff scored 74.29 on his bar exam in 1991 and missed the passing score by one-fifth of a point, where the Supreme Court admitted applicants with a score 74.50 or higher.

10. While the Supreme Court set the passing score for the entire bar exam at 75 from 1974 to 1994, it did not establish a scoring system for the bar examination or set the passing score for the multistate bar exam. In 1994, the Supreme Court approved the procedure as to the scoring system for the bar examination and the passing score for the multistate bar exam recommended by the Board.

11. The following are the Texas Constitutional provisions and civil statutes relating to admission to the Bar. The Texas Constitution vests authority in the Supreme Court to determine who should be admitted to practice law in the State. Vernon's Ann. Texas Const. Art. 2, §1; The Texas Legislature established the Board of Law Examiners. Under Texas law, The Supreme Court's rulemaking power is exclusive and not subject to the approval of the state bar. Tex. Gov't Code Ann. §81.061 (West 1988). The Texas Supreme Court has exclusive authority to grant licenses for the practice of law, Sec. 82.021, Supreme Court authority. The Supreme Court is also authorized to adopt rules on eligibility for examination for a license to practice law and on the manner in which the examination is conducted. The rules include the legal topics to be covered by the course of study and by the examination; and the manner of conducting the examination; and the grades necessary for licensing, Government Code-Title 2 Judicial Branch, Chapter 82. Licensing of Attorneys, Subchapter B. Licensing of Attorneys, Sec. 82.022, (2), (4). The Supreme Court shall adopt rules necessary to administer its functions and to govern the administration of the Board of Law Examiners' function relating to the licensing of lawyers. Sec. 82.022, (6)(b).

12. The Board of Law Examiners acts under instructions of the Supreme Court and shall determine the eligibility of candidates for examination for a license to practice law in this state. Sec. 82.004(a). Board Duties. The board shall examine each eligible candidate as to the candidate's qualifications to practice law. Government Code-Title 2 Judicial Branch,

Chapter 82. Licensing of Attorneys, Subchapter A. Board of Law Examiners. Sec. 82.004(b). Under the law, the Applicants for admission have the right to be governed by the rules approved by the Supreme Court.

13. In discharging its responsibilities under the above statute and prior statutes, the Texas Supreme Court has adopted and published a compilation of rules. The rules in effect in 1991, required a passing score of 75. However, the rules provided no grading or scoring system for the bar examination. See. Tex. R. Governing Admission VII(e) (1991 & 1992). In 1991 and 1992, the description of the bar examination was located in Rules Governing Admission to the Bar VII(e). Amendments in 1993 and adopted by the Supreme Court in 1994, renumbered this rule as Rule XI(e). The 1994 amendments to Rule XI(e) specifically call for the procedure as to the administration of the MBE and for the grading or scoring system. The scoring system for the bar examination now requires a combined score of 675 out of 1000 to pass. The scoring system fixed the passing score for the MBE at 135.

14. The Board and the Supreme Court contended and the state court held, in a suit against the Supreme Court of Texas and the Board of Law Examiners and others, that Rule XX(d) and (e) of the Rules governing admission, prompted or authorized the Board alone to make the procedure as to the grading or scoring system for the bar examination. Rule XX(d) of the Organizational and Miscellaneous powers of the Board provides that: Insofar as may be consistent with these Rules, the Board is authorized to make all reasonable regulations, including written interpretations of general application with respect to these Rules or provisions of general application for relevant subjects not covered by these Rules. The Board may also prescribe forms and certificates to be executed by Applicants for admission to the Texas Bar, whether for a first license or as a practicing attorney of another jurisdiction, or certificates or other forms to be executed by or on behalf of the Board itself. Rule XX(e), provides that the Board is given discretion in the interpretation and application of these Rules. For good cause shown to the satisfaction of the Board, upon written request, waivers of specific requirements described in these Rules may be granted, unless it appears therefrom that no exceptions are contemplated by the Supreme Court.

15. A rejected applicant is not entitled under the Rules to seek in the District Court or in the Supreme Court individualized review of an adverse recommendation of the Board and denial of admission by the Supreme Court based on the subject procedure.

16. Perales filed the petition for injunctive and declaratory relief and damages, in the state district court on July 1993, inter alia, to review the procedure complained as to the violation of state law in the enactment and enforcement of the subject procedure. In particular, he alleged that the procedure as to grading or scoring system was in violation of state law because the Supreme Court did not approved the procedure made by the Board alone, which under the law required approval before it was effective. He further alleged among other claims, that the illegal conduct deprived him of due process and equal protection as to his right to have the 1991 application for admission be governed by rules approved by the Supreme Court. On March 1994, the state district court denied his petition. On May 1995, the state court of appeals affirmed, holding that the Board alone has authority to fix the grading formula for the bar examination. On August 1995, Perales then petitioned the Supreme Court to stop enforcement of the subject procedure made by the Board and not approved by the Supreme Court and to review the decisions of the lower state courts as to the subject 1991 procedure or formula. He alleged that the Board's conduct with respect to the said 1991 procedure violated state law and the subject procedure is void; and further alleged that the orders of the lower state courts are void thereby the state court denied him due process, equal protection and access to courts for consideration of his petition on the basis of fact that the subject formula made by the Board and not approved by the Supreme failed to comply with the law as a matter of law. Ten months later, on June 28, 1996, the Supreme Court denied his petition; and approximately five more months later, on November 15, 1996, the Supreme Court denied the subsequent motion for rehearing and supplement. Application for writ of error to the court of appeals was filed on November 12, 1996 in the Third Court of Appeals in Austin. The Supreme Court on February 21, 1997, dismissed the application for writ of error for want of jurisdiction.

Cause of Action

17. The procedure complained as to grading or scoring system made by the Board alone and not adopted by the Supreme Court is a violaton of state law and is not state or sovereign action as a matter of law. The Supreme Court denied Plaintiff's 1991 application for admission on the sole basis of the said procedure that is not state or sovereign action, and illegally reduced the number of attorneys to the practice of law, a per se violation of §1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C. §1. Goldfarb v. State Bar of Virginia, 421 U.S. 773, 790, 95 S.Ct. 2004, 2014, 44 L.Ed. 2d 572 (1975). The aforesaid unlawful per se non sovereign state action, as to the grading formula made in 1991 by the Board and not approved by the Supreme Court was intended to and did result in a restaint of trade and commerce among the several states by intentionally and unlawfully reducing the numbers of competing attorneys in the State of Texas; and in further consequence of said intentional and unlawful conduct, Plaintiff was among those intentionally and unlawfully denied his right to have his application be governed by the rules approved the supreme court and thus prevented in 1991 from entering into competition as an attorney in the State of Texas and thereby further intentionally and unlawfully deprived of the right to compete as an attorney for the legal business deriving from or involving the Several States of the United States, including Texas.

As a direct and proximate result of defendants' acts alleged above, Plaintiff has been illegally denied the right to have is application for admission be governed by the rules approved by the Supreme Court. Under 15 U.S.C. Section 15, Plaintiff is entitled to recover from each of the Defendants, jointly and severally, threefold such damages sustained as well as future damages and the cost of suit, including reasonable attorneys' fees.

As a result, the public has been deprived of free and open competition in the foregoing trade and commerce. The defendants' actions have harmed and threaten to harm the general public by interfering with the orderly practice of law in the state by reducing the number of lawyers practicing in the State, and by depriving clients of the quality of legal care they would receive but for Defendants' actions against Plaintiff.

18. Notice of Intent to Request a Restraining Order of the procedure complained made by the Board and not approved by the Supreme Court has been delivered to the Supreme Court of Texas and to the Attorney General of Texas.

REQUEST FOR INJUNCTIVE RELIEF

19. A temporary restraining order and preliminary injunction are requested because (a) the actions of the Defendants with respect to the 1991 procedure complained are not state or sovereign action as a matter of law and violate per se the Sherman Act; (b) an irreparable injury will result to Plaintiff, if the actions of Defendants are not enjoined in that Plaintiff is being illegaly denied the right to have his application for admission be governed by the rules approved by the Supreme Court; (b) there is no other adequate remedy at law available to Plaintiff to redress the conduct of Defendants; and (c) the Plaintiff has a reasonable possibility of prevailing on the merits of his claims. Plaintiff has suffered and will continue to suffer extensive damages in the denial of his right to have his application for admission be governed by the rules approved by the supreme court, unless defendants are restrained.

20. Plaintiff alleges that there is no damage or loss to the Defendants for which bond would be necessary to protect. The Defendants should not reasonably be expected to incur any court costs or chargeable costs in this matter. Therefore, Plaintiff requests the Court to set a minimal bond signed by individual sureties.

21. Defendants appeared, participated and orally opposed, by and through James Pinson of the office of the Attorney General on December 11, 1996 on a hearing for temporary restaining order and/or preliminary injunction. The case was referred to and heard by the Honorable John William Black, Magistrate. As of the filing of the First Amended Complaint, the Magistrate has not filed with the court a written recommendation to grant or deny the relief requested.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendants be cited to appear and answer herein, and that the Court:

(1) issue a temporary restraining order at once and a preliminary injunction, pursuant to Sherman Anti-Trust Act and Rule 65 of the Federal Rules of Civil Procedure, ordering and enjoining the Defendant Supreme Court, and individual Defendants, in their individual and official capacities, their agents, servants, and/or employees, and all other persons acting in active concert with them or under their control and direction, to refrain immediately, and pending further hearings and determination of this action, from:

(a) enforcement of the grading system complained that was not approved by the Supreme Court;

(b) denying Plaintiff's right to have his 1991 application for admission be governed by the rules approved by the Supreme Court;

(c) taking any actions under the subject 1991 procedure;

(2) issue order directing the Supreme Court of Texas to immediately and without delay to apply only the rules approved by the Supreme Court to Plaintiff's 1991 application for admission.

(3) upon final hearing, issue a permanent injunction perpetually enjoining Defendants, their agents, servants, and/or employees and all persons acting in active concert with them or under their control and direction, from committing the conduct complained of herein, to wit: enforcement of the formula complained and not approved by the supreme court; and illegally denying Plaintiff's right to have his 1991 application for admission be governed by the rules approved by the Supreme Court ;

(4) declare that the complained formula made by the board and not approved by the Supreme Court is void;

(5) direct the Supreme Court of Texas to apply the rules approved by Supreme Court to Plaintiff's 1991 application for admission;

(6) declare that the said procedure is in violaion of state law and not state or sovereign action as a matter of law, and violated per se the Sherman Act;

(7) award Plaintiff damages and costs;

(8) award treble damages;

(9) award the plaintiff his costs and expenses of this litigation including reasonable attorneys' fees;

(10) order such other and further relief as is necessary to effectuate the foregoing and to which Plaintiff, may be justly entitled.

Respectfully submitted,

_____/s/_____
ROMAN PERALES
Pro Se
McKenzie
Brownsville, Texas 78523
(210) 541-3848
_____/s/_____
Robert H. Mendoza
3505 Boca Chica, Suite 162
P. O. Box 5566
Brownsville, Texas 78523
(210) 541-3848
OF COUNSEL: Federal I.D. 11418
CESAR A. AMADOR Attorney for Plaintiff

Jury Demand

Plaintiff respectfully requests that all issues of fact, save those expressly reserved by law for the Court, be determined by a jury.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF CAMERON

Before me, the undersigned Notary Public, on this day personally appeared ROMAN PERALES, who being by me duly sworn upon his oath deposed and said that he is the Plaintiff in the above-entitled and numbered cause; that he has read the above and foregoing Plaintiff's Amended Complaint; and that every statement contained therein is within his personal knowledge and true and correct.

_____/s/_____

ROMAN PERALES

SUBSCRIBED and sworn to before me on the 8th day of April 1997, to certify which witness my hand and official seal.

_____/s/_____
Abel Bentacourt, Jr.
Notary Public in and for
the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing verified First Amended Complaint, First Amended Motion for Temporary Restraining Order and/or Temporary Injunction and affidavit was forwarded by United States first-class mail, postage-prepaid, on this the 9th day of April, 1997 to the following:

Attorney for Defendants:
Honorable Dan Morales
Attorney General of Texas

James Pinson
Office of the Attorney General
Tom Clark Building
205 West 14th Street
P.O. Box 12548
Austin, Texas 78711-2548

_____/s/_____

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ROMAN PERALES,	§	
Plaintiff	§	
v.	§	Civil Action No.
	§	B-96-226
SUPREME COURT OF TEXAS,	§	
CHIEF JUSTICE	§	
THOMAS R. PHILLIPS, et al	§	
Defendants	§	

December 11, 1996

Minute entry

Attorneys Present: Robert Mendoza and James Pinson.

On this date a hearing was held on the record to address Plaintiff's Motion For Temporary Restraining Order and/or Preliminary injunction. Above Counsel appeared. After argument by counsel, Plaintiff was instructed to address (1) whether venue was proper and (2) whether these claims were precluded by Plaintiff's state court claims. Plaintiff testified that he had not taken any bar exam subsequent to the one complained of in 1991. Defendants were instructed to prepare a written response to Plaintiff's pleadings. The court indicated that a Recommendation to DENY all requested relief would be written on the grounds that no emergency or other injury was demonstrated, but, as agreed to by counsel for the parties, such recommendation would not be issued until Defendant's responsive pleading was filed.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ROMAN PERALES,	§	
Plaintiff	§	
v.	§	Civil Action No.
	§	B-96-226
SUPREME COURT OF TEXAS,	§	
CHIEF JUSTICE	§	
THOMAS R. PHILLIPS, et al	§	
Defendants	§	

STATE DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

TO THE HONORABLE COURT:

Supreme Court of Texas Chief Justice Thomas R. Phillips, Justices Raul A. Gonzalez, Nathan I. Hecht, John Cornyn, Craig Enoch, Rose Spector, Priscilla R. Owen, James A. Baker, Greg Abbott, Dan Morales, Board of Law Examiners of Texas, Rachael Martin and Warlick Carr, hereinafter collectively Defendants, hereby move for dismissal of this action. In support of their motion, Defendants show the court the following:

I.
Factual Background

Plaintiff Roman Perales failed the Texas Bar Exam in February 1989, July 1989, and July 1990. In July 1991, he passed Part II of the exam but failed Part I. In July 1992, he again failed Part II. Then, on June 4, 1993, plaintiff began his crusade to browbeat the legal system into giving him a law license. For four years, Plaintiff has pursued his claims through the State Court system. Plaintiff has now duly litigated his dissatisfaction with the Supreme Court and the Board of Law Examiners before the the Travis County Disrict Courts, the Third Court of Appeals and the Texas Supreme Court. Plaintiffs claim, through his four year state court battle, was, primarily, that his inability to pass the bar stems from a change in the calculation of the Multistate Bar Examination score. This change was made in July 1991 Board of Law

Examiners meeting. Throughout the Plaintiff's state court pleadings, Plaintiff asked the various courts to enjoin the application of the changed MBE score and to enter a passing score for the Plaintiff. On March 28, 1994, after a trial on the merits, the trial court denied Plaintiff's requests for injunctive and declaratory relief. That finding was affirmed by the Third Court of Appeals on May 17, 1995. Plaintiff has filed an avalanche of motions before the Supreme Court of Texas, between August 29, 1995 and March 11, 1996. Included have been a Motion for Leave to File a Petition for Writ of Mandamus, A Motiont for Extension of Time to File a Petition for Writ of Error, A Motion for Emergency Temporary Injunctive Relief and a First Amended Motion for Leave to File Amended Petition for Writ of Mandamus and Writ of Prohibition. These motions were overruled by the Court on june 28, 1996. Plaintiff's Motion of Rehearing of Motion for Leave to File Petition for Writ of Mandamus, as supplemented, Plaintiff's Motion to Recuse and Plaintiff's Motion to Issue License were overruled on November 15, 1996.

II.
Brief in Support

A. Plaintiff's claims should be dismissed under the Rooker-Feldman Doctrine.

Plaintiff in actuality is seeking to collaterally attack an order rendered in a state court proceeding by claiming, at this late date and after exhausting all State Court remedies, that there is not an adequate State Court forum for his complaints. This Court lacks appellate jurisdiction over state court proceedings under the Rooker-Feldman Doctrine, and Plaintiff's request for relief should be dismissed. Although Plaintiff's complaint seeks redress for alleged anti-trust violations, the essential relief sough is review of the state court's orders against Plaintiff.

Plaintiff's allegations regarding anti-trust violations stem from alleged defects in the procedure and rulings in the Texas Courts. Such claims are properly reviewed in the state judicial system, not in federal district court. As the Fifth Circuit has stated, "judicial errors committed in the state courts are for correction in the state court system, at the head of which stands the United States Supreme Court; such errors are

no business of ours." Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986).

Under the Rooker-Feldman doctrine, this Court has no appellate jurisdiction over the questioned state court proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983).

This is the relief that the Plaintiff seeks in the present case. Plaintiff is improperly seeking an appellate review by this court in an attempt to have this Court reverse the rulings in the Texas State court civil action rendered against Plaintiff. To circumvent dismissal, Plaintiff has attempted to camouflage this improper action by couching its allegations in terms of anti-trust violations that are closely based upon the decisions rendered by the Texas state court. This Court does not have jurisdiction over this action and should therefore dismiss Plaintiff's suit.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiff's suit be dismissed and that Plaintiff takes nothing by his suit and that all costs be taxed against Plaintiff; Defendant further prays that the Court grant Defendant whatever and other further relief to which they may show themselves to be justly entitled both in law and in equity.

Respectfully submitted,
DAN MORALES
Attorney General of Texas
JORGE VEGA
First Assistant Attorney General
LAQUITA A. HAMILTON
Deputy Attorney General for Litiation
TONI HUNTER, Chief
General Litigation Division
_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by u.S. Mail on April 14, 1997 to :

Robert H. Mendoza
p. O. box 5566
Brownsville, Texas 78523

Roman Perales, Pro Se
1403 Lawson
Houston, Texas 77023

/s/
ALLISON H. ECCLES

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ROMAN PERALES,	§	
Plaintiff	§	
v.	§	Civil Action No.
	§	B-96-226
SUPREME COURT OF TEXAS,	§	
CHIEF JUSTICE	§	
THOMAS R. PHILLIPS, et al	§	
Defendants	§	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Roman Perales ("Perales") has failed the Texas Bar Examination three times coming heartbreakingly close once. Since 1993, he has been engaged in the Texas state courts with the Texas Supreme Court and the Board of Bar Examiners. He has been unsuccessful in pressing his argument that the Board of Bar Examiners improperly changed the method of scoring the Multistate Bar Examination in 1991, and did not get that decision notified by the Supreme Court.

On December 5, 1996, Perales filed this suit against the Texas Suprmee Court, the individual justices of that court, the Attorney General of Texas, the Board of Bar Examiners, its Executive Director and its Chairman.

PERALES' CLAIMS

Perales claims that the defendants violated the Sherman Anti-trust Act 15 U.S.C. §1 seq. The factual predicate of this claim is that under Texas law the function of the Board of Bar Examiners is to advise the Texas Supreme Court which has the authority to set standards for the Bar Examination. According to Perales and not denied by the State defendants, the Board of Bar Examiners did not get approval from the Supreme Court forr the formula used in 1991 to determine whether or not someone had passed the Exam.

Perales argues that he is entitled to an injunction and a declaratory judgment declaring the 1991 Bar Examinations void.

THE STATE'S RESPONSE

The State has filed a Motion to Dismiss arguing that this Court has no jurisdiction over Perales's claims which are in effect a collateral attack on a state court judgment. The State cites Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Disrict of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) for this proposition.

RECOMMENDATION

Hoover v. Ronwin, 466 U.S. 558 (1983) involved a fact situation virtually identical to Perales. Ronwin sued to gain admission to the Arizona Bar, claiming that the grading procedure in Arizona was a violation of the Sherman Act, because it was aimed at restricting the number of lawyers in the state. Arizona's procedures are identical to Texas' i.e. the Supreme court has authority to admit to the Bar. The Court delegated the power to examine applicants to a Committee which established a grading formula which was submitted for approval to the Supreme Court.

In the Hoover case, the U. S. Supreme Court held that since this proceeding gives ultimate authority for admission to the Bar to the Arizona Supreme Court, it is state action and thus exempt from the application of the federal anti-trust laws under the state action doctrine Parker v. Brown, 317 U.S. 341 (1943).

Perales attempts to distinguish Hoover from his case by arguing that the Texas Board of Bar Examiners did not submit the grading formula to the Texas Supreme Court in 1991. He argues that this administrative lapse permits the application of the Sherman Act to his claims. In their motion to Dismiss, the state defendants do not address this point. Their motion is limited to the claim that this court has no jurisdiction. This position is best stated by the Fifth Circuit in Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986):

> Judicial errors committed in state courts are for correction in the state court systems, at the head of which stands the United States Supreme Court; such errors are no business of ours.

Perales attempts to clothe his complaints about the adminstration of the Texas Bar Examination in the garb of an

anti-trust suit when in reality it is a complaint about the way he was treated in the Texas judicial system. This is ". . . no business of ours."

IT IS THEREFORE RECOMMENDED that this case be DISMISSED for want of jurisdiction.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. Douglass v. United Services Automobile Association, 79 F.3d 1415 (5th Cir. 1996).

DONE at Brownsville, Texas, this 28th day of April, 1997.

_____/s/_____
John Wm. Black
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ROMAN PERALES,	§	
Plaintiff	§	
v.	§	Civil Action No.
	§	B-96-226
SUPREME COURT OF TEXAS,	§	
et. al.,	§	
Defendants	§	

ORDER OF DISMISSAL

Before the Court is the Magistrate Judge's Report and Recommendation on the above-referenced cause of action. After a de novo review of the entire file, it is the opinion of this Court that the Magistrate Judge's Report and Recommendation of April 28, 1997, should be Adopted.

Accordingly, it is hereby ORDERED, ADJUDGED, AND DECREED, that the above-referenced Report and Recommendation should be and is hereby fully Adopted and the case is Dismissed with Prejudice.
SO ORDERED.

DONE at Brownsville, Texas this 21st day of May, 1997.

/s/
FILEMON B. VELA
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ROMAN PERALES, Plaintiff	§	
v.	§	Civil Action No. B-96-226
SUPREME COURT OF TEXAS, et. al., Defendants	§	

ORDER

Before this Court is Plaintiff Roman Perales' Emergency Motion for Reconsideration in the above-referenced cause of action. For the reasons stated in the previously-issued Order of Dismissal dated May 21, 1997, the Court is of the opinion that the relief sought therein should be DENIED.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Plaintiff's Emergency Motion for Reconsideration should be and is hereby DENIED.

DONE at Brownsville, this 30th day of July, 1997

/s/
FILEMON B. VELA
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-40721
Summary Calendar

ROMAN PERALES
Plaintiff-Appellant

versus

SUPREME COURT OF TEXAS, CHIEF JUSTICE THOMAS R. PHILLIPS; JUSTICES RAUL A. GONZALEZ; NATHAN I. HECHT; JOHN CORNYN; CRAIG ENOCH; ROSE SPECTOR; PRISCILLA R. OWEN; JAMES A. BAKER; GREG ABBOTT; in their individual and official capacities; DAN MORALES, Attorney General of Texas, individually and in his official capacity; BOARD OF LAW EXAMINERS OF TEXAS; RACHAEL MARTIN, Executive Director of Texas Board of Law Examiners; WARLICK CARR, Chairman, Texas Board of Law Examiners; individually and in their official capacities

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
(B-96-CV-226

Before JOHNSON, JONES, and DEMOSS, Circuit Judges.

PER CURIAM:*

Pro se Plaintiff Roman Perales appeals the district court's dismissal of his complaint. In his complaint, Perales argued that the grading formula used in the 1991 Texas Bar Examination violated the Sherman Act. The district court concluded that because Perales's complaint was "about the way he was treated in the Texas judicial system[,]" the court did not have subject matter jurisdiction.

This court reviews a district court's dismissal for lack of jurisdiction de novo. Musselwhite v. State Bar of Texas, 32 F.3d 942, 945 (5th Cir. 1994), cert. denied, 515 U.S. 1103 (1995). Under the Rooker/Feldman doctrine, federal courts lack jurisdiction to entertain collateral attacks on state court judgments. Liedtke v. State Bar of Texas, 18 F.3d 315, 317 (5th Cir.), cert. denied, 513 U.S. 1036 (1994). Stripped to its essentials, Perales's complaint is an attack on the judgment of the state court. Therefore, after a careful review of the record and the controlling authorities, this Court holds that the district court did not err in dismissing Perales's complaint for lack of subject matter jurisdiction. See Musslewhite, 32 F.3d at 945.

Perales also asserts that his right to access to courts, due process and equal protection were violated by the district court's dismissal of his complaint. A litigant's right of access to the courts is implicated where the ability to file suit is delayed or blocked all together. Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994). The district court's dismissal of Perales's complaint did not abridge his right of access to the court, his right to due process or his right to equal protection.

This court does not consider Perales's argument in support of mandamus as the issue is moot.

Therefore, for the foregoing reasons, the judgment of the district court is AFFIRMED.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-40721

ROMAN PERALES
Plaintiff-Appellant

versus

SUPREME COURT OF TEXAS, CHIEF JUSTICE THOMAS R. PHILLIPS; JUSTICES RAUL A. GONZALEZ; NATHAN I. HECHT; JOHN CORNYN; CRAIG ENOCH; ROSE SPECTOR; PRISCILLA R. OWEN; JAMES A. BAKER; GREG ABBOTT; in their individual and official capacities; DAN MORALES, Attorney General of Texas, individually and in his official capacity; BOARD OF LAW EXAMINERS OF TEXAS; RACHAEL MARTIN, Executive Director of Texas Board of Law Examiners; WARLICK CARR, Chairman, Texas Board of Law Examiners; individually and in their official capacities

Defendants-Appellees

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 3/27/98, 5 Cir.., , F.3d)
Before JOHNSON, JONES and DeMOSS, Circuit Judges.

PER CURIAM:
(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Suggestion for Rehearing is also DENIED.

ENTERED FOR THE COURT
/S/ Sam D. Johnson
United States Circuit Judge

APPENDIX I

28 U.S.C. §1254
Court of Appeal; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1651
Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C.A. 1337
Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original juisdiction of an action brought under section 11707 of the title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

Sherman Act, 15 U.S.C.A. § 1 seq.

§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any person, $350,000, or by imprisonment not exeeeeding three years, or by both said punishments, in the discretion of the court.

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce

among the serveral States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be

punished by fine not exceeding $10,000,000 if a corporation, or, if any person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.